IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN HERNANDEZ and CLEONA HERNANDEZ, husband and wife,	)	DIVISION ONE
Respondent/Cross-Appellants,	)	No. 62770-8-I
v.	)	UNPUBLISHED OPINION
TIMOFEY FEDORCHENKO and JANE DOE FEDORCHENKO, husband and wife, and the marital community thereof,	)	
Appellant/Cross-Respondents.	)	FILED: July 19, 2010

Dwyer, C.J. — Timofey Fedorchenko and his wife appeal from the judgment entered on a jury's verdict finding him liable in tort to Steven and Cleona Hernandez, who, in turn, cross-appeal. Finding no error, we affirm.

I

In 2000, Timofey Fedorchenko was driving east on a main thoroughfare in Kirkland. At a large intersection, eastbound traffic was provided two through-traffic lanes and one dedicated left turn lane. Fedorchenko approached the intersection in the left through-traffic lane. By the time he realized that he desired to make a left turn at the intersection, he could no longer enter the dedicated left turn lane.

Although the traffic lights for the through-traffic lanes were green, Fedorchenko stopped his vehicle in the left through-lane. In response, the car directly behind Fedorchenko stopped without incident, as did the second car behind Fedorchenko, which was driven by Steven Hernandez. However, soon after the Hernandez vehicle stopped, it was struck from behind by a vehicle driven by Wendy Warmenhoven.

Warmenhoven had been driving her vehicle in the right through-traffic lane. She had become impatient because, although the traffic light was green, her lane of traffic had stopped.[1] After the Hernandez vehicle passed her, she looked behind her to make sure that the left through-lane was clear. She then moved over into the left through-traffic lane, whereupon she struck the rear of the Hernandez vehicle.

Steven Hernandez had a history of back injury. After a 1993 traffic collision, Hernandez underwent spinal surgery to repair a herniated disc. Hernandez eventually recovered most of the function that he had lost as a result of the 1993 collision. After the 2000 collision with Warmenhoven, however, Hernandez again suffered back pain. In 2001, Hernandez underwent a second surgery.

Hernandez and his wife[2] sued Warmenhoven and Fedorchenko and his

[1] The lane in which Warmenhoven was stopped had not been moving forward because a vehicle driven by one of Fedorchenko's coworkers was also stopped at the intersection, attempting to turn to the left from the right through-traffic lane.

[2] The plaintiffs include both Steven Hernandez and his wife Cleona Hernandez. Cleona Hernandez brought claims for loss of consortium and for the value of the services she provided to her husband. Unless the context dictates otherwise, we refer to the plaintiffs in the singular,

wife. Subsequently, Hernandez and Warmenhoven entered into a settlement agreement, and she was dismissed from the action in 2005. Litigation continued between Hernandez and Fedorchenko.

On September 4, 2008, the trial court ordered Fedorchenko to produce either of two proposed defense expert medical witnesses for deposition within eight days of the entry of the order. The trial court's order explicitly provided that "[t]he defendant bears the risk that the elected doctor will not agree to testify or for any reason is not allowed to testify." Fedorchenko did not comply with this order. Although Fedorchenko had elected which expert medical witness he proposed to call, he did not produce the expert for deposition as ordered. As a result of Fedorchenko's failure to comply with the discovery order, the trial court excluded the expert witness, leaving Fedorchenko with no defense expert medical witness at trial.

Dr. Bradley Billington was the excluded witness. Dr. Billington had been retained four years earlier by Warmenhoven's attorney, prior to Warmenhoven's dismissal from the lawsuit, to conduct a CR 35 physical examination of Hernandez. Dr. Billington performed the examination and wrote a report opining that the injuries necessitating Hernandez's second surgery were not caused by the collision. Fedorchenko's attorney had added Dr. Billington to his witness list on the last day allowed for disclosure of such witnesses.

Prior to the discovery cutoff date, Hernandez requested to depose Dr.

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as Hernandez, for ease of reference.

Billington. However, Fedorchenko did not respond to this request. The trial court then became involved in the discovery process. The record suggests that Fedorchenko's counsel never formally retained or even directly contacted Dr. Billington prior to the trial court's exclusion of him as an expert witness.

Hernandez moved for partial summary judgment, contending, as a matter of law, that Fedorchenko was negligent, that Fedorchenko's negligence was the proximate cause of the collision, and that Warmenhoven was not negligent, thus precluding Fedorchenko from asserting the affirmative defense of third-party fault. The trial court granted partial summary judgment on the issue of Fedorchenko's negligence but denied the motion on the issues of causation and Warmenhoven's negligence.

Also prior to trial, Hernandez moved to exclude Warmenhoven's testimony regarding the force of the impact and the resulting damage to the vehicles. Warmenhoven had testified in her deposition that she had "bumped" into Hernandez's vehicle and that there had been no damage to her vehicle resulting from the collision. The trial court granted the motion.

Fedorchenko did not testify at trial, but portions of his deposition were read into evidence. Hernandez, however, did testify, along with his wife, mother, father-in-law, childhood friend, and former work supervisor. Several of Hernandez's treating physicians and physiatrists also testified. Hernandez's surgeon testified that "[t]he auto accident was a cause of the need to do the

[2001] surgery." An expert in accident reconstruction opined that Warmenhoven "would not have been able to avoid that collision," unless she had never moved into the adjoining lane of traffic. Warmenhoven also testified, admitting that she had decided to change lanes because she was impatient due to her lane being completely stopped and that when she had looked over to change lanes, she "must not have looked very well."

At the close of the evidence, Hernandez moved for a directed verdict on the issue of Fedorchenko's affirmative defense that Warmenhoven was at fault. The trial court denied the motion. Fedorchenko lodged an objection to the proposed jury instructions based on the trial court's refusal to instruct the jury regarding Warmenhoven's statutory duty when changing lanes. The trial court concluded that Fedorchenko's proposed instruction was unnecessary because other instructions allowed him to make the same arguments.

The jury was provided a special verdict form containing six questions. The first question, regarding whether Fedorchenko was negligent, stated that, "The Court has determined that Timofey Fedorchenko was negligent in this collision so the "Yes" answer has been filled in. You should proceed to Question 2 and answer it."[3] Fedorchenko did not object to this verdict form. The jury found that Fedorchenko's negligence was a proximate cause of Hernandez's

[3] Question 2 asked whether Fedorchenko's actions were the proximate cause of Hernandez's injuries. Question 3 asked whether Warmenhoven was negligent. Question 4 asked whether Warmenhoven's actions were a proximate cause of Hernandez's injuries. Question 5 asked the jury to determine the amount of Hernandez's damages. Question 6 asked the jury to apportion fault for Hernandez's injuries between Fedorchenko and Warmenhoven.

injuries, that Warmenhoven was negligent, and that her negligence was an additional proximate cause of Hernandez's injuries. The jury apportioned liability as follows: 75 percent to Fedorchenko and 25 percent to Warmenhoven. The jury found that Hernandez proved $500,000 in damages and that his wife proved $50,000 in damages.

Fedorchenko moved for a new trial, raising the same arguments that he now raises on appeal. This motion was denied. The trial court entered judgment consistent with the jury's verdict.

Fedorchenko appeals and Hernandez cross-appeals.

II

Fedorchenko first contends that the trial court erred in granting partial summary judgment that Fedorchenko was negligent.[4] We disagree.

We review de novo a grant of partial summary judgment. Federal Way Sch. Dist. No. 210 v. State, 167 Wn.2d 514, 523, 219 P.3d 941 (2009). We view the facts and any reasonable inferences from those facts in the light most favorable to the nonmoving party. Federal Way Sch. Dist., 167 Wn.2d at 523.

An individual is negligent where he or she owes a duty of care to another and he or she breaches that duty. Squires v. McLaughlin, 44 Wn.2d 43, 48, 265

[4] Specifically, the trial court's written order reads "IT IS, THEREFORE, HEREBY ORDERED that reasonable minds cannot differ that defendant Fedorchenko was negligent []." This order was prepared by the plaintiff. The trial court specifically refused to order—and crossed out language on the proposed order—as follows: "[] and was a cause of the collision. The motion is therefore granted with respect to defendant's liability for the collision." Thus, the trial court found that duty and breach of duty had been established as a matter of law but that proximate cause had not been established. The use of the word "negligent" as a substitute for "duty and breach of duty" was inartful but, in context, was in no way misleading.

P.2d 265 (1953). Whether a duty exists is a question of law. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). In contrast, the issue of whether an individual breaches his or her duty of ordinary care is "'generally not susceptible to summary judgment'" and the trier of fact should make such a determination. Xiao Ping Chen v. City of Seattle, 153 Wn. App. 890, 909, 223 P.3d 1230 (2009) (quoting Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 788, 108 P.3d 1220 (2005)). However, where reasonable minds could reach but one conclusion, summary judgment is proper. Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 178 n.10, 94 P.3d 945 (2004).

A driver owes a duty of care to other nearby drivers, including a duty to exercise ordinary care to avoid placing others in danger. Martini v. State, 121 Wn. App. 150, 160, 89 P.3d 250 (2004). Every person using a public street or highway is entitled to assume that other persons thereon will use ordinary care and obey the rules of the road. Poston v. Mathers, 77 Wn.2d 329, 334, 462 P.2d 222 (1969). In addition to these common law duties, a driver turning left at an intersection has a statutory duty to turn left from the extreme left-hand lane lawfully available for such a turn: "The driver of a vehicle intending to turn left shall approach the turn in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of the vehicle." RCW 46.61.290(2). The violation of an applicable statute may be evidence of negligence. RCW 5.40.050.

Because Fedorchenko intended to turn left, he had a statutory duty to turn left from the dedicated left turn lane. Because he was in a lane of traffic other than the extreme left lane lawfully available to him when he attempted to turn left, he violated his statutory duty. Further, Fedorchenko testified in his deposition that he knew he was not supposed to make a left turn from the through-traffic lane, that he knew he was in a through-traffic lane rather than the dedicated left turn lane, and that he stopped completely and abruptly at the intersection even though the traffic light was green. Here, reasonable minds could not differ that Fedorchenko had a duty to exercise ordinary care and breached this duty. The trial court properly granted partial summary judgment.

III

Fedorchenko next contends that the trial court abused its discretion by excluding the testimony of Fedorchenko's proposed expert medical witness, Dr. Billington, as a sanction for Fedorchenko's noncompliance with the trial court's discovery order. We disagree.

A trial court has broad discretion in deciding whether and how to sanction a party for violations of discovery orders. Goodman v. Boeing Co., 75 Wn. App. 60, 84, 877 P.2d 703 (1994), aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995). We will not overturn a trial court's choice of sanctions for noncompliance with a discovery order absent a manifest abuse of discretion. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). A trial court may

properly exclude witnesses or expert witness testimony as a sanction where there is a showing of intentional nondisclosure, willful violation of a court order, or unconscionable conduct. Burnet, 131 Wn.2d at 494 (quoting Fred Hutchinson Cancer Research Ctr. V. Holman, 107 Wn.2d 693, 706, 732 P.2d 974 (1987)). Where the trial court chooses such a remedy, "'it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,' and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial." Burnet, 131 Wn.2d at 494 (quoting Snedigar v. Hodderson, 53 Wn. App. 476, 487, 768 P.2d 1 (1989)). "A violation of a court order without reasonable excuse will be deemed willful." Allied Fin. Servs., Inc. v. Mangum, 72 Wn. App. 164, 168, 864 P.2d 1, 871 P.2d 1075 (1993).

Fedorchenko disclosed Dr. Billington as a proposed expert medical witness but did not make him available for deposition after such a request was made. The record does not reflect whether Dr. Billington or any of the other proposed medical witnesses were ever contacted or retained by Fedorchenko prior to the September 4, 2008 hearing. Even at oral argument in this court, Fedorchenko's attorney was unable to direct us to evidence in the record that Dr. Billington had been retained. The trial court ordered that Dr. Billington be produced for deposition and Fedorchenko was informed that he bore the risk if

the doctor was not amenable to deposition within the time set forth in the order.

Fedorchenko failed to comply with the trial court's discovery order and provided no legitimate justification for this failure. Thus, the violation was properly deemed willful. Allied Fin. Servs., 72 Wn. App. 168. With limited time remaining before trial, the court initially sought to avoid resorting to exclusion as a sanction by expediting Dr. Billington's deposition. Only when Fedorchenko failed to comply with the trial court's discovery order did the court exclude Dr. Billington's proposed testimony. The trial court exercised its discretion in order to address both untimely discovery and Fedorchenko's noncompliance. Further delay would have been to Hernandez's prejudice, as trial was fast approaching and the discovery cutoff had passed. The trial court did not abuse its discretion.

IV

Fedorchenko next contends that the trial court erred by excluding Warmenhoven's testimony regarding her perception of the collision, including the force of the vehicles' impact and the resulting damage. We disagree.

The decision to admit or exclude evidence is within the sound discretion of the trial court; we will not reverse such a decision absent a manifest abuse of discretion. State v. Iverson, 126 Wn. App. 329, 336, 108 P.3d 799 (2005).

To be admissible, evidence must be relevant. ER 402. Evidence is relevant where it has any tendency to make the existence of any consequential fact more probable or less probable than it would be without the evidence. ER

401. Facts that tend to establish a party's theory or disprove an opponent's evidence are relevant. Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976). However, even where relevant, evidence may still be excluded if its probative value is substantially outweighed by the likelihood that it will mislead the jury or contribute to a confusion of the issues. ER 403. The trial court has wide discretion in determining whether evidence will mislead the jury. State v. Luvene, 127 Wn.2d 690, 707, 903 P.2d 960 (1995). Evidence that could lead the jury to engage in improper speculation is properly characterized as evidence that may mislead the jury, for purposes of applying ER 403.

The testimony excluded herein was Warmenhoven's statements that her vehicle "bumped" into Hernandez's vehicle and that her vehicle sustained no damage as a result of the collision. Fedorchenko contends that Warmenhoven's proffered testimony was within the bounds of ER 701, which allows a witness to testify regarding lay opinions that are rationally based on the witness's perception and are helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Fedorchenko makes much of the fact that similar evidence was admitted in other cases. But evidentiary rulings in other cases comprise a poor guide to evaluate the trial court's ruling in any particular case. The simple fact is that evidentiary rulings are often made in light of *other* evidentiary rulings made in the same case. Moreover, notwithstanding the provisions of ER 701, otherwise admissible opinion evidence "may be excluded

under ER 403 if it is confusing, misleading, or if the danger of unfair prejudice outweighs its probative value." City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

The trial court viewed Warmenhoven's lay testimony as potentially misleading to the jury. It was intended to cause the jury to speculate that the low impact nature of the collision could not have caused any injury to Hernandez. Thus, the trial court's ruling must be properly viewed in light of its other rulings.

The exclusion of Warmenhoven's testimony herein must be considered in light of both the trial court's exclusion of Dr. Billington's proposed testimony that the collision was not the cause of Hernandez's need for back surgery and the absence of any other expert testimony on the physical effects of low impact collisions. The trial court was understandably concerned that Fedorchenko was attempting to get the jury to *speculate* that Hernandez's back injury was not proximately caused by the collision—a medical opinion excluded by the trial court in its order regarding Dr. Billington. The trial court acted well within the range of discretion bestowed to it in making related rulings foreclosing such an "end run" around its order. The trial court did not err by precluding the jury from speculating as to the issue of medical causation. Viewing this ruling in the context of the entire trial and related rulings, as we must, we discern no error.

V

Fedorchenko next contends that the trial court erred by refusing to give

his proposed instruction regarding Warmenhoven's statutory duty when changing lanes. We disagree.

"A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. [A] trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo." State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (internal citation omitted). The parties herein agree that we should review for an abuse of discretion the trial court's refusal to give Fedorchenko's proposed instruction.

When there is substantial evidence to support a party's theory of the case, the party is entitled to have the trial court instruct the jury on that theory. Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). However, the trial court "has considerable discretion in deciding how the instructions will be worded." Gammon v. Clark Equip. Co., 104 Wn.2d 613, 617, 707 P.2d 685 (1985). Instructions are inadequate only if they prevent a party from arguing its theory of the case or they misstate the applicable law. Capers v. Bon Marche, 91 Wn. App. 138, 142, 955 P.2d 822 (1998). Error in giving jury instructions is reversible only if it can be shown that the error affected the outcome of the trial. Stiley v. Block, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996).

An instruction that is incomplete is misleading and is not a proper statement of the law. State v. Twitchell, 61 Wn.2d 403, 410, 378 P.2d 444

(1963). The trial court is not required to give an instruction that is not a complete statement of the law. Becker v. Tacoma Transit Co., 50 Wn.2d 688, 698, 314 P.2d 638 (1957); see also Mannisto v. Boeing Airplane Co., 60 Wn.2d 304, 307-08, 373 P.2d 496 (1962); Easley v. Sea-Land Serv., Inc., 99 Wn. App. 459, 472, 994 P.2d 271 (2000); Sing v. John L. Scott, Inc., 83 Wn. App. 55, 76, 920 P.2d 589 (1996), rev'd on other grounds, 134 Wn.2d 24, 948 P.2d 816 (1997). The trial court is not required to rewrite proposed instructions to conform to the law. Jones v. Halvorson-Berg, 69 Wn. App. 117, 125, 847 P.2d 945 (1993). The trial court should not give an instruction that places an extreme emphasis in favor of one party. Young v. Carter, 38 Wn. App. 147, 149, 684 P.2d 784 (1984).

Fedorchenko asserts that the trial court erred by not instructing the jury on a driver's statutory duty when making a lane change. A statute provides:

> A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

RCW 46.61.140(1). Fedorchenko's claim of error is unavailing for three reasons.

First, the trial court properly instructed the jury on a driver's common law duty to exercise reasonable care and to obey the rules of the road. As correctly noted by the trial court, this allowed Fedorchenko to argue his theory of the case.

Second, the jury found Warmenhoven to be at fault. Thus, the claimed error was not prejudicial to Fedorchenko on the question of Warmenhoven's negligence.

Finally, Fedorchenko claims that the jury was unable to properly evaluate Warmenhoven's fault without this proposed instruction. At oral argument, he argued that the jury may have assessed greater than 25 percent of the fault to Warmenhoven had the instruction been given. But Fedorchenko's proposed instruction did not mention *his own statutory violations* and the jury was not elsewhere so instructed. Thus, the proposed instruction was incomplete, would have been misleading to the jury, and would have improperly emphasized Fedorchenko's theory of the case. On this basis, as well, the trial court was correct in refusing to so instruct the jury.

There was no error.

VI

Finally, Fedorchenko contends that the trial court impermissibly commented on the evidence in the special verdict form.[5] We disagree.

Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but

[5] Fedorchenko did not timely object at trial to the special verdict form. However, because judicial comments on the evidence are explicitly prohibited by the Washington Constitution, a party asserting that an instruction or special verdict form impermissibly comments on the evidence raises an issue involving a manifest constitutional error, and the claimed error may be considered on appeal even though it was not objected to at trial. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006); State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

shall declare the law." An impermissible comment on the evidence conveys to the jury a judge's personal attitude toward the merits of a case or permits the jury to infer, from what the judge said or did not say, that he or she believed or disbelieved certain testimony. Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988).

Relying on State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997), Fedorchenko asserts that the phrasing in the special verdict form—"The Court has determined that Timofey Fedorchenko was negligent in this collision"—effectively relieved Hernandez of his burden to prove that Fedorchenko's negligence caused the collision and Hernandez's injuries. However, unlike in Becker, 132 Wn.2d at 65, where the special verdict form literally decided an essential element of the charged crime, the language in the special verdict form herein did not direct the jury on the merits of an element of Hernandez's negligence claim. No rational juror could have inferred from this special verdict form that the trial judge was telling the jury that Fedorchenko had caused the collision.

The primary issues presented by the evidence and testimony admitted at trial were whether the collision proximately caused Hernandez's injuries and whether the actions of Warmenhoven, Fedorchenko, or both proximately caused the collision. The jury was then specifically instructed that the trial court had determined that Fedorchenko had acted negligently but that Hernandez "has the

burden of proving each of the following propositions: First, that Steven Hernandez was injured; and, Second that the negligence of the defendant was a proximate cause of damages to Steven Hernandez or to Cleona Hernandez." Instruction 3. The instructions further defined proximate cause and explained that there could be more than one proximate cause of a collision. Instruction 7. In addition, the jury was instructed that it could find that Warmenhoven was the sole cause of the collision and of Hernandez's damages: "if you find that the sole proximate cause of injury or damage to the plaintiff was the act of Wendy Warmenhoven then your verdict should be for the defendant." Instruction 7. Moreover, the jury was instructed that any indication of the personal opinion of the trial judge regarding testimony or other evidence was to be entirely disregarded. Instruction 1. The special verdict form explicitly charged the jury to determine whether Fedorchenko's acts were a proximate cause of plaintiff's damages and it required the jury to determine whether Warmenhoven was negligent and whether her acts were a proximate cause of the collision.

It is axiomatic that jury instructions must be read as a whole. Roberts v. Goerig, 68 Wn.2d 442, 455, 413 P.2d 626 (1966). When the instructions and special verdict form herein given are viewed as a whole—as the jury was properly instructed to view them—there is no possibility that the jury believed that it received a judicial comment on the evidence. In light of the trial as a whole, the instructions, and the special verdict form, the challenged language

did not constitute a prohibited comment on the evidence.[6]

VII

In his cross appeal, Hernandez first contends that the trial court erred by denying his motion for summary judgment regarding the issue of Warmenhoven's negligence. We will not review this claimed error.

"[D]enial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact." Johnson v. Rothstein, 52 Wn. App. 303, 304, 759 P.2d 471 (1988); cf. McGovern v. Smith, 59 Wn. App. 721, 734, 735 n.3, 801 P.2d 250 (1990) (denial of summary judgment as to substantive legal issues may be reviewed on appeal following a trial).

Hernandez contends that the denial of summary judgment "was decided by application of a presumption of negligence" arising from the following driver rule.[7] Hernandez contends that the application of a presumption of negligence

[6] Fedorchenko also assigns error to the trial court's denial of his motion for a new trial. However, he does not raise any new arguments. For all of the reasons discussed above, the trial court did not err in denying Fedorchenko's motion for a new trial.

[7] When a collision occurs between a preceding vehicle and a following vehicle, a presumption of negligence known as the "following driver rule" exists:

> Where two cars are traveling in the same direction, the primary duty of avoiding a collision rests with the following driver. In the absence of an emergency or unusual conditions, he is negligent if he runs into the car ahead. The following driver is not necessarily excused even in the event of an emergency, for it is his duty to keep such distance from the car ahead and maintain such observation of that car that an emergency stop may be safely made.

Miller v. Cody, 41 Wn.2d 775, 778, 252 P.2d 303 (1953) (internal citation omitted). However, the "following driver" rule provides only "[a] prima facie showing of negligence[, which] may be overcome by evidence that some emergency or unusual condition not caused or contributed to by the following driver caused the collision, in which event the liability of the following driver becomes a jury question." Vanderhoff v. Fitzgerald, 72 Wn.2d 103, 106, 431 P.2d 969 (1967).

is a substantive legal matter and, thus, the denial of summary judgment on such a basis may be appealed from even when a trial has occurred.

"Whether there has been negligence . . . is a jury question, unless the facts are such that all reasonable persons must draw the same conclusion from them, in which event the question is one of law for the courts." Hough v. Ballard, 108 Wn. App. 272, 279, 31 P.3d 6 (2001). The trial court herein denied summary judgment regarding third-party fault based upon a determination that reasonable minds could differ in determining whether the evidence presented and the reasonable inferences that could be drawn from such evidence established that Warmenhoven acted negligently. Thus, summary judgment was not denied based on a substantive legal issue.[8] The issue of Warmenhoven's negligence was decided by the jury following trial. Therefore, Hernandez cannot appeal from the denial of summary judgment. Johnson, 52 Wn. App. at 304.

VIII

Hernandez also contends that there was insufficient evidence to support the jury's finding that Warmenhoven was negligent. We disagree.

Absent legal error, a jury verdict can be overturned only when it is unsupported by substantial evidence. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). Evidence must be considered and all

[8] This conclusion is bolstered by the trial court's order denying partial summary judgment, which explicitly states that "[w]ith respect to third party fault the court found that presumptions or inferences exist that require trial." This statement does not support Hernandez's contention that the trial court relied solely on the application of the "following driver" presumption.

inferences drawn in favor of the verdict. Ketchum v. Wood, 73 Wn.2d 335, 336, 438 P.2d 596 (1968). Moreover, credibility determinations and the weight given to evidence are matters for the jury. Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). A reviewing court may not substitute its judgment for that of the jury so long as there is evidence which, if believed, would support the verdict. Burnside, 123 Wn.2d at 108.

Evidence introduced at trial established that Warmenhoven changed lanes after growing impatient with traffic stopped in front of her and that she did not carefully check traffic in the adjacent lane. Although an expert witness testified that Warmenhoven could not have avoided the collision once she began changing lanes, the jury could reasonably infer that Warmenhoven acted negligently in changing lanes in the first instance or could have found the witness unpersuasive. Substantial evidence supports the jury's verdict.[9]

Affirmed.[10]

[9] Hernandez moved for a directed verdict on the issue of Warmenhoven's fault. The trial court denied the motion. Hernandez appealed from the trial court's denial but failed to specifically assign error to the denial or to provide specific argument in his briefing related to it. Where evidence or reasonable inferences from the evidence exist to support a verdict for the nonmoving party, a directed verdict should not be granted. Winkler v. Giddings, 146 Wn. App. 387, 394, 190 P.3d 117 (2008), review denied, 165 Wn.2d 1034 (2009). For the reasons discussed above, the trial court properly denied the motion.

[10] Fedorchenko requests that he be awarded his costs on appeal. He does not provide required argument or citation to authority, Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998), and he is not the prevailing party. He is not entitled to an award of costs.

Dwyer, C.J.

We concur:

Spearman, J.

Becker, J.